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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-376

ONE LOT EMERALD CUT STONES AND ONE RING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ONE LOT EMERALD CUT STONES
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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANCISCO FARKAC KLEMENTOVA, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra, pp. App. 1) is not yet reported. The opinion of the District Court (App. C, infra, p. App. 13) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 9, 1972. (App. B, infra, pp. App. 11) The jurisdiction of this Court is invoked pursuant to Title 28 United States Code §1254(1).

QUESTION PRESENTED

I.

WHETHER THE ACQUITTAL OF THE OWNER OF MERCHANDISE ON CRIMINAL CHARGES ALLEGING UNLAWFUL IMPORTATION OF THAT MERCHANDISE INTO THE UNITED STATES, IN VIOLATION OF TITLE 18 UNITED STATES CODE §545, BARS A SUBSEQUENT FORFEITURE PROCEEDING DIRECTED AGAINST THE SAME PROPERTY.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Five:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code §545

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States. . . . ."

Title 19 United States Code §1497

> "Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article."

STATEMENT

On September 8, 1970, the United States commenced a forfeiture action in the United States District Court for the Southern District of Florida, against One Lot Emerald Cut Stones And One Ring seized on June 5, 1969, by Bureau of Customs Agents from the petitioner, Francisco Farkac Klementova. The complaint alleged that the emeralds and ring were brought into the United States by means of a false or fraudulent statement in that the property was not included in a declaration and entry as required by law contrary to the provisions of Title 19 United States Code §1497 and Title 18 United States Code §545; that the seizure of the property was pursuant to Title 18 United States Code §545; and that by reason of the foregoing, particularly Title 18 United States Code §545, the property was forfeited to the United States.

Klementova, as the owner of the emeralds and ring, filed his answer and defended against the forfeiture on the ground that he had been acquitted on the charge of having knowingly and willfully smuggled and clandestinely introduced the emeralds and ring into the United States in violation of Title 18 United States Code §545.

The District Court, primarily relying upon *Coffey v. United States*, 116 U.S. 436, *Ashe v. Swenson*, 397 U.S. 436, and *United States v. U. S. Coin and Currency*, 401 U.S. 715, held that the prior acquittal of the criminal charges constituted a bar to the subsequent forfeiture proceedings. (App. C, infra, pp. App. 13)

The Court of Appeals reversed the District Court and remanded the case for entry of judgment for the United States. (App. A, infra, pp. App. 1)

REASONS FOR GRANTING THE WRIT

1. The decision of the case *sub judice* is *squarely* in conflict with *United States v. Two Hundred And One Fifty-Pound Bags Of Furazolidone*, 52 F.R.D. 222, ____ F.2d ____ (CA8, 1971),[1] certiorari denied, 92 S.Ct. 1168.[2]

2. Subsequent to *Coffey v. United States*, 116 U.S. 436, other decisions[3] of this Court resolving related issues have caused many lower courts to question the continuing vitality of *Coffey*.[4]

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[1]The opinion of the Eighth Circuit has not been published, but is included herein as App. D, pp. 21,22

[2]Chief Justice Burger was of the opinion that the petition should be granted.

[3]*Murphy v. United States*, 272 U.S. 630; *Various Items of Personal Property v. United States*, 282 U.S. 577; *Helvering v. Mitchell*, 303 U.S. 391; *United States ex rel. Marcus v. Hess*, 317 U.S. 537; *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148.

[4]*United States v. 1953 Oldsmobile*, 222 F.2d 668 (CA4); *United States v. One Dodge Sedan*, 113 F.2d 552 (CA3); *United States v. Cramer*, 191 F.2d 741 (CA9); *United States v. 20 Strings Seed Pearls*, 34 F.2d 142 (SDNY); *United States v. Burch*, 294 F.2d 1 (CA5); *United States v. Physic*, 175 F.2d 338 (CA2); *Neaderland v. C.I.R.*, 424 F.2d 639 (CA2).

3. The recent decision of *United States v. U. S. Coin and Currency*, 401 U.S. 715, in part relied upon by the Trial Court herein, raises the important issue of whether or not every forfeiture by its very nature is protected by *all* of the provisions of the Fifth Amendment.

4. The principles of law involved herein, unless decided, will become an even greater and more serious problem for trial courts in the future. Effective October 1, 1972, Rules 7 and 31 of the Federal Rules of Criminal Procedure have been amended to require that all indictments contain the extent of any interest or property subject to *criminal* forfeiture (Rule 7) and that a special verdict be returned concerning that interest (Rule 31).[5] This case will afford the Court an appropriate opportunity to determine what distinction, if any, exists between *civil and criminal* forfeiture and whether *all* forfeitures are punitive (or remedial) and its relationship with Amendment Five of the United States Constitution.

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[5]Some of the problems envisioned by the petitioner are:

1. Must the Trial Court instruct on both reasonable doubt and preponderance of the evidence?
2. If the verdict were not guilty as to both the criminal and forfeiture provisions, could the government then proceed under a different forfeiture statute, such as in the instant case?
3. The probability of inconsistent verdicts as to the crime and the forfeiture.

ARGUMENT

Notwithstanding this Court's clear language in *United States v. U. S. Coin and Currency*, 401 U.S. 715, holding that forfeitures for wrongful acts are punitive, the Fifth Circuit concludes that the forfeiture herein is in aid of the collection of customs duties and, therefore, remedial. Apparently, it does so under the rationale of *Helvering v. Mitchell*, 303 U.S. 391. The Fifth Circuit fails to make the distinction between administrative penalties, as discussed in *Helvering*, and the punitive forfeiture of a person's property. This Court specifically distinguished *Coffey v. United States*, 116 U.S. 436 in the *Helvering* decision.

Under the doctrine of *Ashe v. Swenson*, 397 U. S. 436, collateral estoppel is embodied in the double jeopardy clause of Amendment Five. Klementova having been acquitted of the charges cannot constitutionally be punished, by forfeiting his property, for the same transaction based upon the same evidence and substantially the same offense.

CONCLUSION

In view of the conflict between the Fifth and Eighth Circuits and the other serious questions regarding the nature of forfeiture proceedings, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3584

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

ONE LOT EMERALD CUT STONES AND ONE RING,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 9, 1972)

Before TUTTLE, MORGAN and RONEY,
Circuit Judges.

TUTTLE, Circuit Judge: The United States appeals from the dismissal by the trial court of a forfeiture action in which the United States sought the forfeiture of One Lot of Emeralds and a Ring based upon a violation of Title 18 USC Section 545 and Title 19 USC Section 1497.

The essential facts are not controverted. On June 5th, 1969, Francisco Farkac Klementova, hereinafter called the claimant, entered the United States at the Miami International Airport in Dade County in the Southern District of Florida, without declaring for U.S. Customs, the articles which are the subject matter of this forfeiture complaint. He did, however, declare a few small items like a couple of bottles of liquor and some cigarettes. The claimant was immediately arrested and the articles were sized. The record discloses that the domestic and foreign values of the articles are $30,150.00 and $19,476.00 respectively and the duty on them would have amounted to $335.89.

Klementova was indicted by a Federal Grand Jury charging him as follows:

> "On or about June 5, 1969, at Miami, Dade County, in the Southern District of Florida, the defendant,
>
> FRANCISCO FARKAC KLEMENTOVA, a/k/a Francisco Farkac
>
> willfully and knowingly, and with intent to defraud the United States, did smuggle and clandestinely introduce into the United States at the Port of Miami, merchandise, that is, a quantity of cut and polished emeralds, and one ring, contrary to law, as the defendant then knew, in that said merchandise had not been presented for inspection as required by Title 19, United States Code, Section 1461; that the defendant failed to declare said merchandise as required by Title 19 of the Code of Federal Regulations, Chapter 1,

> Section 10.19; and that the defendant failed to pay duty on said merchandise as required by Title 19 of the Code of Federal Regulations, Chapter 1, Section 8.1; in violation of Title 18, United States Code, Section 545." (emphasis added)

The case was tried to the Honorable Charles B. Fulton, without a jury, who entered a judgment of not guilty of the charge. Of some possible significance, although not determinative of the law, we think it appropriate to quote some of Judge Fulton's language which he used to give the basis for his judgment of acquittal:

> "He is, obviously, a sophisticated dealer in emeralds and other jewelry.
>
> "I don't condone nor do I approve, for one minute, what he did in this instance. I think he knew that that jewelry—that that ring and those emeralds should have been declared.
>
> "He made a declaration of some cigarettes and some whiskey, several other little odd, meager items there, but I'm not persuaded beyond a reasonable doubt that he did what he did with the intent to defraud the United States." (emphasis added)

Following this acquittal the Government then filed its action for forfeiture stating that the action was "based upon a violation of Title 18 USC §545 and Title 19 USC §1497".

In defense of the action the claimant pleaded the acquittal on the charge brought under the clearly criminal sections of Section 545[1] as a bar to the forfeiture proceeding: "In that the facts, matters and property described in the indictment are identical with that described in the complaint for forfeiture; (2) that the judgment of acquittal aforesaid constitutes collateral estoppel to the forfeiture proceedings; (3) that the trial and judgment of acquittal constitute former jeopardy, and is a bar to these proceedings; (4) that under the doctrine of res adjudicata this action is barred."

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[1]18 USCA §545 provides as follows:

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law —

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States. . . . ."

The trial court, discussing only the provisions of the above quoted criminal section, that is Section 545, and without making any reference to USCA 19 §1497,[2] agreed with the claimant that such acquittal constituted a bar to the forfeiture proceedings. The court based its judgment on the earlier Supreme Court decision of Coffey v. United States, 116 U.S. 436 (1886), and United States v. Rosenthal, (5th Cir., 1909) 174 F2d 652.

The trial court also concluded that forfeiture proceedings per se have now been finally declared punitive by the Supreme Court in United States v. U. S. Coin and Currency, 401 U.S. 715 (1971).

We think it quite clear that if the only basis for the proceeding to forfeit the merchandise here before the court were that contained in Section 545, we would agree with the disposition of the case made by the trial court. This is because the facts of the case would bring it strictly in line with the Supreme Court decision in Coffey and this court's decision in United States v. Rosenthal, supra. However, the appellant makes no effort to answer the Government's contention that the forfeiture provisions of the customs laws, dealing with "collection of duties" as set out in Section

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[2]Section 1497 is a part of the Tariff Act of 1930. This is to be distinguished from §545 of Title 18 which is part of the Criminal Code of the United States. Section 1497 provides as follows:

"Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forefeiture and such person shall be liable to a penalty equal to the value of such article."

1497 of Title 19 provides for the forfeiture of merchandise of this nature upon the occurrence of entirely different facts and circumstances than are required to constitute a basis of an indictment and/or forfeiture under Section 545 of Title 18. As is clear from the language of the sections quoted in footnotes (1) and (2), supra, the criminal section requires proof beyond a reasonable doubt of a knowing and willful smuggling or clandestinely introducing, into the United States, merchandise with intent to defraud the United States which should have been invoiced. Then it is equally plain that forfeiture provisions of the same section provide for forfeiture only if the merchandise is "introduced into the United States in violation of this section." Thus, to obtain a forfeiture under Section 545, it must be proved that the gems, here in issue, were knowingly and willfully smuggled or clandestinely introduced into the United States with intent to defraud the United States. To the contrary, in order to impose the sanctions contained in 19 USCA §1497, no crime of any sort need be proved. There is not a word about willfully or knowingly with intent to defraud the United States or about smuggling or clandestinely introducing into the United States in this section. It merely provides that if a person brings in an article and makes a written declaration or an oral declaration which does not include a particular item in question, and he fails to mention it before the examination of his baggage has begun, the merchandise is forfeited.

Thus, we do not have a case where proof necessary to cause a forfeiture under Section 1497 would sustain a conviction under Section 545. The cases are, therefore, not controlled by either Coffey or Rosenthal.

A careful reading of these two cases indicates that in both instances the forfeiture could be made only upon proof of willful or knowing conduct and criminal intent. The forfeitures which were there sought were not made under a statute which made the objects subject to seizure through the innocent conduct (that is to say, conduct of less than criminal in nature or definition) of a person whose act would result in the United States losing certain duties or tariffs.

In the Coffey case the Supreme Court said: "The information [for forfeiture] is founded on Sections 3257, 3450 and 3453; and there is no question, on the averments and the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit." (emphasis added) 116 U.S. 436, 442. In the Rosenthal case, decided by this court in 1909, the court said: "The claimants in this having been acquitted of the offense of smuggling in the criminal prosecution, the law declares that such verdict and judgment of acquittal may be interposed in bar of a libel of information based upon practically the same offense." (emphasis added) The court then said: "The court is of the opinion that such judgment of acquittal is a bar to all the counts in the information contained, for the reason that all the counts of the information charged substantially the smuggling of the articles, that is to say, the clandestine introduction of the same into the United States without paying or accounting for the duties with intent to defraud the revenue. And the same proof substantially is necessary to sustain the counts as was required upon the trial of the criminal case of smuggling." (emphasis added)

The appellee also relies upon the proposition that a forfeiture is per se punitive in nature, and apparently concludes from that that if the forfeiture is in any way connected with the facts that may have been part or all of the basis of an earlier criminal prosecution, the forfeiture is barred. In doing so he relies on United States v. U. S. Coin and Currency, 401 U.S. 715. The trial court also cited this case and quoted the following language:

> "But as Boyd v. United States, 116 U.S. 616, 634 (1886), makes clear, 'proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form are in their nature criminal' for Fifth Amendment purposes. (Emphasis Supplied) From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owners wrongful conduct; in both cases, the Fifth Amendment applies with equal force."

The trial court thereupon said: "This statement brings the entire case into focus. Forfeiture is punitive, and not remedial." With deference to the views of the trial court we must point out that although it emphasized the words "by reason of offenses committed by him," the trial court failed to give effect to these words. As we have shown, the forfeiture provided in this case is not a forfeiture of a man's property "by reason of offenses committed by him." This forfeiture is by reason of a provision, not even spoken

of as a penalty, cf. Helvering v. Mitchell, 303 U.S. 391 (in which the Supreme Court held that a fifty percent fraud penalty could be claimed by the government notwithstanding a prior acquittal in a criminal case involving precisely the same fraud against the government,) but in aid of collection of duties owed the United States. As we have indicated above, also, without even the need of drawing the distinction between the standard of proof in a criminal case and that in a forfeiture case, the facts on which the libel for forfeiture here were based are not the same facts which formed the basis of the indictment against the claimant.

We conclude that the libel or information for forfeiture of the goods here involved was fully authorized by the section of the Code dealing with collection of the duties owed the United States. Under this section a negligent error of the person who introduced the articles would result in their forfeiture precisely the same as if the act had been done on purpose. It was, therefore, not necessary to prove anything more than the simple violation of Section 1497 in order for the government to prevail. These facts are amply proved in the record before us and it was error for the trial court to dismiss the action for forfeiture as barred by the previous acquittal of a separate offense.

The judgment is REVERSED and the cause is REMANDED for entry of judgment for the United States.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-3584

D. C. Docket No. 70-1310

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

ONE LOT EMERALD CUT STONES AND ONE RING,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before TUTTLE, MORGAN and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for entry of judgment for the United States in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

June 9, 1972

Issued as Mandate:

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 70-1310-CIV-JLK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE LOT EMERALD CUT STONES AND ONE RING,
Defendant.

MEMORANDUM OPINION AND ORDER

This forfeiture action is before the Court for final disposition on the record therein.

The plaintiff, UNITED STATES OF AMERICA, filed this action for forfeiture of one lot of emeralds and a ring based upon a violation of Title 18 United States Code §545 and Title 19 United States Code §1497.

This Court has jurisdiction by virtue of Title 28 United States Code §1355.

AGREED FACTS

The essential facts are not controverted. On June 5, 1969, FRANCISCO FARKAC KLEMENTOVA, hereinafter called claimant, entered the United States at the

Miami International Airport in Dade County in the Southern District of Florida, without declaring for U. S. Customs the articles which are the subject matter of this forfeiture complaint. The claimant was immediately arrested and the articles seized.[1]

A federal grand jury in this district returned an indictment (#69-340-CR-CF) charging the claimant as follows:

> "On or about June 5, 1969, at Miami, Dade County, in the Southern District of Florida, the defendant,
>
> FRANCISCO FARKAC KLEMENTOVA, a/k/a Francisco Farkac
>
> willfully and knowingly, and with intent to defraud the United States, did smuggle and clandestinely introduce into the United States at the Port of Miami, merchandise, that is, a quantity of cut and polished emeralds, and one ring, contrary to law, as the defendant then knew, in that said merchandise had not been presented for inspection as required by Title 19, United States Code, Section 1461; that the defendant failed to declare said merchandise as required by Title 19 of the Code of Federal Regulations, Chapter 1, Section 10.19; and that the defendant failed to pay duty on said merchandise as required by Title 19 of the Code of Federal Regulations, Chapter 1, Section 8.1; in violation of Title 18, United States Code, Section 545."

[1]The domestic and foreign values of the articles are $30,150.00 and $19,476.00, respectively, and would have a custom duty of $335.89.

On February 9, 1970, the Honorable Charles B. Fulton, Chief Judge, after trial, adjudicated the claimant not guilty of the charge.

The claimant is the owner of the property and, accordingly, has the right to defend this action and demand restitution of the property.

CLAIM OF THE GOVERNMENT

The government proceeds here on the theory that the forfeiture is entirely independent of the earlier criminal case.

CLAIMANT'S CONTENTION

The claimant contends that under the doctrine of collateral estoppel and res judicata, his acquittal bars the forfeiture proceeding.

TEST OF COLLATERAL ESTOPPEL

A threshhold question to be resolved is whether or not the doctrine of collateral estoppel is available under the factual circumstances.

In Ashe v. Swenson, 397 U. S. 436 (1970) the court defined collateral estoppel as follows:

> "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

In a concurring opinion, Justice Brennan, joined by Justices Douglas and Marshall, reviewed the development of double jeopardy which by the Ashe decision embraces collateral estoppel. The transition ran from the test of "same offence" to the "same evidence" to what is described as the now-established rule of the "same transaction".

In any event, regardless of the test applied, the criminal case and these forfeiture proceedings are based upon the same offense, Title 18 United States Code §545, the same evidence,[2] and the same transaction. Therefore, if applicable under the law, the doctrine of collateral estoppel factually would operate as a bar to this lawsuit.

PUNITIVE OR REMEDIAL

In Coffey v. United States, 116 U. S. 436 (1886),[3] the Supreme Court first established the principle in a distilled spirits tax case that the acquittal in a criminal case barred the forfeiture of the defendant's property which was the subject of the alleged criminal activity. The government argued that the general verdict of not guilty in the criminal case may have been premised on the failure to prove the charges beyond a reasonable doubt whereas in the forfeiture case, being civil in nature, the burden was considerably less. The court in rejecting this, said at page 443:

> "Nevertheless, the fact or act had been put in issue and determined against the United States;

[2]Counsel for both parties at the pre-trial conference were willing to proceed upon the transcript of the record in the criminal case.

[3]Recently cited on the doctrines of collateral estoppel in *Ashe v. Swenson, supra,* n. 7.

and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor."

In Helvering v. Mitchell, 303 U. S. 391 (1938), the taxpayer argued that having been acquitted of income tax evasion, the government was estopped from asserting civil fraud penalties against him. In sustaining the position of the commissioner and ruling against the taxpayer, the court said:

> "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. (citing cases) Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding is punishment and would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction." (citing cases) (Emphasis Supplied)

The Court ruled that the fraud penalty was a "civil administrative sanction", remedial in nature, and, therefore, the Coffey case and United States v. LaFranca, 282 U. S. 568, were distinguishable.

FIFTH CIRCUIT VIEW

In United States v. Rosenthal, 174 F. 652 (5th Cir., 1909), the Court of Appeals, in a customs case identical in all respects to the facts herein, adhered to the rule of

Coffey and held that the acquittal of the charge of smuggling barred forfeiture proceedings for the same articles.

More recently, in United States v. Burch, 294 F. 2d 1 (5th Cir., 1961), the issue was again before the Court in a forfeiture proceeding based upon a violation of the Internal Revenue laws relating to a non-tax paid distilled spirits. The Court in Burch acknowledged the Helvering v. Mitchell, supra, philosophy and said:

> "If the forfeiture action is criminal (punitive) then a determination in the one might bar re-examination of the same issue in the other. On the other hand, if it is a civil, that is remedial, suit there is considerable doubt that res judicata would act as a bar to the maintenance of it."

Burch pointed out further that one of the factors in determining whether the proceeding is punitive or remedial,

> "is the existence of express criminal penalties for the same wrongful act within the same statutory scheme imposing the sanction of forfeiture."[4]

In Burch, for the purpose of the decision, it was assumed that forfeiture proceedings were punitive and, therefore, could be barred by a prior acquittal if factually supported. The Court held, however, that collateral estoppel was inapplicable because Burch had been found not guilty of conspiracy to violate the alcohol tax laws and not the substantive crime, which was the basis of the pending forfeiture proceeding.

[4]Not only is the forfeiture provision in this case in the same statutory scheme, it is in fact a part of the same statute under which the claimant was originally prosecuted, to-wit: Title 18 United States Code §545.

FORFEITURE IS PUNITIVE

The nature of forfeiture proceedings has now been finally resolved by the Supreme Court in United States v. U. S. Coin and Currency, 91 Sup. Ct. 1041 (1971). The Court said:

> "But as Boyd v. United States, 116 U.S. 616, 634 (1886), makes clear, "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form are in their nature criminal" for Fifth Amendment purposes. (Emphasis Supplied) From the relevant constitutional standpoint there is no difference between a man who "forfeits" $8,674 because he used the money in illegal gambling activities and a man who pays a "criminal fine" of $8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owners wrongful conduct; in both cases, the Fifth Amendment applies with equal force."

This statement brings the entire case into focus. Forfeiture is punitive, and not remedial.

CONCLUSION

Since the prior criminal case and these forfeiture proceedings are based upon identical circumstances (offense, evidence and transaction) and clearly forfeiture being punitive, the acquittal in the criminal case through the guarantees of Amendment Five to the United States Constitution collaterally estopps the government from punishing the daimant by the forfeiture of his property.

ORDER

It is, thereupon,

ORDERED AND ADJUDGED that the complaint for forfeiture be and is hereby dismissed with prejudice; each party to bear their respective costs.

It is, further,

ORDERED AND ADJUDGED that the one lot of emeralds and the ring be returned to the claimant upon the payment of custom duties in the sum of $335.89, or, in the alternative, that the aforesaid articles be placed in bond and held there pending arrangements by the claimant to remove them from territorial limits of the United States.

DONE AND ORDERED at Miami, Dade County, Florida, this 17 day of September, 1971.

/s/ James Lawrence King

UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1329

UNITED STATES OF AMERICA,
Appellant

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE,
Defendant

and

ALVIN L. MALZ, Intervenor,
Appellee

Appeal from the United States District Court for The District of North Dakota

Before VAN OOSTERHOUT, MEHAFFY and GIBSON, Circuit Judges.

PER CURIAM.

On June 14, 1971 appellee Alvin L. Malz, as intervenor, filed a motion for summary affirmance under local Rule 8. Appellee contends that the district court's ruling

is correct and does not present a substantial question for review. The district court ruled that appellee's acquittal of a two-count indictment alleging violations of 18 U.S.C. §545 was a bar to any subsequent forfeiture action under this section, relying primarily on Coffey v. United States, 116 U.S. 436 (1886).

The court has carefully reviewed the motion and the original records of the district court and finds the motion for summary affirmance should be granted under local Rule 8.

It is so ordered.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-376

ONE LOT EMERALD CUT STONES AND ONE RING,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 8, 1970, the United States commenced a forfeiture action in the United States District Court for the Southern District of Florida against one lot of emerald cut stones and one ring seized by Customs agents from Francisco Farkac Klementova on June 5,

1969. The complaint alleged that the emeralds and the ring had been brought into the United States by means of a false or fraudulent declaration or statement in that they had not been included in a declaration and entry, in violation of 19 U.S.C. 1497 and 18 U.S.C. 545.[1]

Klementova intervened to claim ownership and to urge that forfeiture was barred. He had previously been charged in a one-count indictment with having knowingly and willfully, with intent to defraud the United States, smuggled and clandestinely introduced the emeralds and ring into the United States, in violation of 18 U.S.C. 545. After a bench trial in the Southern District of Florida, he had been acquitted on that charge.[2]

The district court, relying on *Coffey* v. *United States,* 116 U.S. 436, *Ashe* v. *Swenson,* 397 U.S. 436, and *United States* v. *United States Coin and Currency,* 401 U.S. 715, concluded that the forfeiture action was punitive and was based upon the same transaction as the prior criminal prosecution, and held that forfeiture of Klementova's property under either 19 U.S.C. 1497 or 18 U.S.C. 545 was barred by the Double Jeopardy Clause of the Fifth Amendment (Pet. App. C, 13-20). The court of appeals reversed (Pet. App. A, 1-9) in an opinion reported at 461 F.2d 1189. The court of appeals

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[1] 19 U.S.C. 1497 makes subject to forfeiture articles not included in the declaration and entry. 18 U.S.C. 545 provides for forfeiture of articles fraudulently or knowingly imported contrary to law.

[2] The trial judge believed that Klementova intentionally failed to declare the merchandise but was not persuaded beyond a reasonable doubt that Klementova had intended to defraud the United States (Pet. App. A, 3).

agreed with the district court that the acquittal on the criminal charge under 18 U.S.C. 545 barred a subsequent forfeiture under that statute, but it concluded that a forfeiture under 19 U.S.C. 1497 was not barred. The court reasoned that the proof required under the latter statute need establish only that the merchandise was not included in a declaration and entry at the time it was brought into the United States and need not show an intent to defraud, as required for conviction under 18 U.S.C. 545.

As petitioner points out (Pet. 5), the decision below conflicts with the decision of the Court of Appeals for the Eighth Circuit denying forfeiture in *United States v. Two Hundred and One Fifty-Pound Bags of Furazolidone* (No. 71-1329, decided July 13, 1971), certiorari denied, 405 U.S. 964. In *Furazolidone,* forfeiture had been sought pursuant to both 18 U.S.C. 545 and 19 U.S.C. 1460 (the latter is a provision of the Tariff Act that decrees forfeiture of any merchandise brought into the United States from a contiguous country without being reported for inspection). Here, in addition to reliance on 18 U.S.C. 545, forfeiture was sought under 19 U.S.C. 1497, a provision of the Tariff Act providing for the forfeiture of imported merchandise not included in a declaration and entry. In that case, as here, the owner-claimant was acquitted of criminal violations of 18 U.S.C. 545. While both the Eighth Circuit and the court below concluded that forfeiture under 18 U.S.C. 545 is impermissible where the owner has been previously acquitted of criminal charges under that statute, their decisions conflict on whether forfeiture under the Tariff Act is permissible in such circumstances. Even

apart from the conflict among the courts of appeals,[3] lack of authoritative guidance in this difficult area of the law may cause confusion in the implementation of recent revisions to the Federal Rules of Criminal Procedure, dealing for the first time with forfeiture.[4]

In light of the foregoing considerations, we would normally acquiesce in the grant of certiorari here. We do not suggest the appropriateness of certiorari in this case, however, because we believe the result below, sustaining the forfeiture, is sound.[5] In addition, this Court

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[3] The Eighth Circuit's decision in *Furazolidone* is also in conflict with the decision of the First Circuit in *Leiser* v. *United States*, 234 F.2d 648, certiorari denied, 352 U.S. 893, where forfeiture was decreed under 19 U.S.C. 1497 after the owner had been acquitted of criminal charges under 18 U.S.C. 545.

[4] Rule 7(c)(2) provides:

> When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

Rule 31(e) provides:

> If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Rule 32(b)(2) provides:

> When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

[5] We disagree with that aspect of the court's ruling that holds the forfeiture impermissible under 18 U.S.C. 545. In our petition for a writ of certiorari in *Furazolidone*, No. 71-672, we elaborated our reasons for urging that forfeiture is proper under 18 U.S.C. 545 as well as under the Tariff Act.

denied certiorari in the *Furazolidone* case, raising the same issues, only last Term.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

☆ U.S. Government Printing Office: 1972—479-243/236

ONE LOT EMERALD CUT STONES AND ONE RING *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-376. Decided December 11, 1972

A forfeiture of imported merchandise not included in a declaration and entry pursuant to the tariff provision in 19 U. S. C. § 1497 is not barred by a prior acquittal under 18 U. S. C. § 545, which (unlike the civil forfeiture proceeding) requires proof of an intent to defraud; nor is the forfeiture action barred by the Double Jeopardy Clause, since Congress may impose both a criminal and civil sanction respecting the same act or omission.

Certiorari granted; 461 F. 2d 1189, affirmed.

PER CURIAM.

On June 5, 1969, Francisco Farkac Klementova entered the United States without declaring to United States Customs one lot of emerald cut stones and one ring. Klementova was indicted, tried, and acquitted of charges of violating 18 U. S. C. § 545[1] by willfully and know-

[1] "Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

"Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

"Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person de-

ingly, with intent to defraud the United States, smuggling the articles into the United States without submitting to the required customs procedures. Following the acquittal, the Government instituted a forfeiture action in the United States District Court, Southern District of Florida, under 18 U. S. C. § 545 and § 497 of the Tariff Act of 1930, 46 Stat. 728, 19 U. S. C. § 1497.[2] Klementova intervened in the proceeding and argued that his acquittal of charges of violating 18 U. S. C. § 545 barred the forfeiture. The District Court held that the forfeiture was barred by collateral estoppel and the Fifth Amendment. The United States Court of Appeals for the Fifth Circuit reversed, holding that a forfeiture action pursuant to 19 U. S. C. § 1497 was not barred by an acquittal of charges of violating 18 U. S. C. § 545. We grant certiorari, affirm, and thereby resolve a conflict among the circuits as to whether a forfeiture is barred in these circumstances.[3]

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scribed in the first or second paragraph of this section, shall be forfeited to the United States.

"The term 'United States,' as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam."

[2] Title 19 U. S. C. § 1497 provides:

"Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article."

[3] In *United States* v. *Two Hundred and One Fifty-Pound Bags of Furazolidone*, No. 71–1329 (1971), cert. denied, 405 U. S. 964 (1972), the Court of Appeals for the Eighth Circuit affirmed a summary judgment on the basis of a previous acquittal of charges of violating § 545 in favor of the owner of property in a forfeiture action commenced by the Government under 18 U. S. C. § 545 and 19 U. S. C. § 1460. The Court of Appeals for the First Circuit agrees with the view of the Fifth Circuit in the present case. See

Collateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the Government. *Ashe* v. *Swenson*, 397 U. S. 436, 443 (1970). But in this case acquittal on the criminal charge did not necessarily resolve the issues in the forfeiture action. For the Government to secure a conviction under § 545, it must prove the physical act of unlawful importation as well as a knowing and willful intent to defraud the United States. An acquittal on the criminal charge may have involved a finding that the physical act was not done with the requisite intent. Indeed, the court that tried the criminal charge specifically found that the Government had failed to establish intent.[4] To succeed in a forfeiture action under § 1497, on the other hand, the Government need only prove that the property was brought into the United States without the required declaration; the Government bears no burden with respect to intent. Thus, the criminal acquittal may not be regarded as a determination that the property was not unlawfully brought into the United States, and the for-

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Leiser v. *United States*, 234 F. 2d 648, cert. denied, 352 U. S. 893 (1956).

We need not, and do not, decide whether an acquittal under § 545 bars a forfeiture under § 545.

[4] The judge at the criminal trial specifically stated:

"He is, obviously, a sophisticated dealer in emeralds and other jewelry.

"I don't condone nor do I approve, for one minute, what he did in this instance. I think he knew that that jewelry—that that ring and those emeralds should have been declared.

"He made a declaration of some cigarettes and some whiskey, several other little odd, meager items there, but I'm not persuaded beyond a reasonable doubt that he did what he did with the intent to defraud the United States."

feiture proceeding will not involve an issue previously litigated and finally determined between these parties.[5]

Moreover, the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. The acquittal of the criminal charges may have only represented "'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'" *Helvering* v. *Mitchell*, 303 U. S. 391, 397 (1938). As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings. See *Murphy* v. *United States*, 272 U. S. 630 (1926); *Stone* v. *United States*, 167 U. S. 178 (1897).

If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely

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[5] The difference in the issues involved in the criminal proceeding, on the one hand, and the forfeiture action, on the other, serves to distinguish *Coffey* v. *United States*, 116 U. S. 436 (1886), relied upon by the District Court in the present case. *Coffey* involved a forfeiture action commenced after an acquittal. This Court noted, in holding the forfeiture barred, that "[t]he information [for forfeiture] is founded on §§ 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit." *Id.*, at 442. The Court specifically distinguished the situation where "a certain intent must be proved to support the indictment, which need not be proved to support the civil action." *Id.*, at 443. See also *Stone* v. *United States*, 167 U. S. 178 (1897).

punishing twice, or attempting a second time to punish criminally, for the same offense." *Helvering* v. *Mitchell, supra,* at 399. See also *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943).[6] Forfeiture under § 1497 is a civil sanction. The provision was originally enacted as § 497 of the Tariff Act of 1922, 42 Stat. 964. The Tariff Act of 1930 re-enacted the forfeiture remedy, 46 Stat. 728, and added § 593, 46 Stat. 751, which became 18 U. S. C. § 545. The forfeiture provision fell within Title IV of the Act, which contained the "Administrative Provisions." Part III of that title, of which § 1497 was a part, dealt with "Ascertainment, Collection, and Recovery of Duties." Section 545, on the other hand, was part of the "Enforcement Provisions" and became part of the Criminal Code of the United States. The fact that the sanctions were separate and distinct and were contained in different parts of the statutory scheme is relevant in determining the character of the forfeiture. Congress could and did order both civil and criminal sanctions, clearly distinguishing them. There is no

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[6] The District Court relied upon the following language in *United States* v. *U. S. Coin & Currency,* 401 U. S. 715, 718 (1971):

"But as *Boyd* v. *United States,* 116 U. S. 616, 634 (1886), makes clear, 'proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offences committed by him,* though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes." (Emphasis in *United States* v. *U. S. Coin & Currency.*)

Section 1497 does not result in a forfeiture by reason of the commission of a criminal offense. A forfeiture results from the act of importation without following customs procedures; no criminal offense, much less a criminal conviction, is required. Cf. *id.,* at 718–722.

One 1958 Plymouth Sedan v. *Pennsylvania,* 380 U. S. 693 (1965), is likewise inapposite for it dealt with a forfeiture that could not be had without a "determination that the criminal law has been violated." *Id.,* at 701.

reason for frustrating that design. See *Helvering* v. *Mitchell, supra,* at 404.

The § 1497 forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions. See *id.,* at 401; *United States ex rel. Marcus* v. *Hess, supra,* at 549–550; *Rex Trailer Co.* v. *United States,* 350 U. S. 148, 151–154 (1956). Moreover, it cannot be said that the measure of recovery fixed by Congress in § 1497 is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty. *Rex Trailer Co.* v. *United States, supra,* at 154. See *Murphy* v. *United States, supra; United States ex rel. Marcus* v. *Hess, supra.*

> "Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings . . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering* v. *Mitchell, supra,* at 400.

The question of whether a given sanction is civil or criminal is one of statutory construction. *Id.,* at 399. It appears that the § 1497 forfeiture is civil and remedial, and, as a result, its imposition is not barred by an acquittal of charges of violating § 545.

Affirmed.